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JUL 6 1931
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No. 115

In the Supreme Court of the United States

OCTOBER TERM, 1931

EDGAR PERCY LEWIS AND RICHARD F. COOPER, AS TRUSTEES UNDER THE WILL OF ARTHUR FRANCIS THOMAS COOPER, DECEASED, PETITIONERS

v.

MARSHALL S. REYNOLDS, INDIVIDUALLY AND AS COLLECTOR OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1931

No. 115

EDGAR PERCY LEWIS AND RICHARD F. COOPER, AS Trustees Under the Will of Arthur Francis Thomas Cooper, Deceased, petitioners

v.

MARSHALL S. REYNOLDS, INDIVIDUALLY AND AS Collector of Internal Revenue

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 37–40) is reported as *Collinson* v. *Reynolds* in 43 F. (2d) 395. The opinion of the Circuit Court of Appeals (R. 44–46) is reported in 48 F. (2d) 515.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered March 19, 1931. (R. 47.) Petition for a writ of certiorari was filed May 27, 1931. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the Commissioner of Internal Revenue was justified in rejecting a claim for refund of income taxes under the following circumstances:

The claim for refund asked for the allowance of a certain deduction which had previously been refused, but which should have been granted. The amount of this deduction was less than the amount of a deduction on account of another matter which the Commissioner had erroneously allowed. The time allowed by statute for assessment of the tax had expired when the Commissioner rejected the claim for refund.

STATUTES INVOLVED

The applicable statutes are set forth in the Appendix, *infra*, pp. 11–15.

STATEMENT

This suit was brought in the District Court for the District of Wyoming. A jury having been waived, the following findings of fact were made by the court (R. 6–8):

The administrator of an estate filed with the Commissioner of Internal Revenue a Federal income tax return for the period from January 1 to December 12, 1920. In this return deduction was claimed for attorney's fees of $20,750, and for a Wyoming inheritance tax of $16,870. The Commissioner originally disallowed the deduction claimed for the Wyoming inheritance tax, but

allowed the deduction claimed for the attorney's fees, and the amount of the tax determined on this basis was paid.

On July 29, 1926, the administrator filed a claim for refund, asserting the right to deduct the amount of the Wyoming inheritance tax, besides some other smaller items which need not be considered here. By letter dated May 18, 1929, the Commissioner advised him that the amount of the inheritance tax paid to the State of Wyoming was allowed as a deduction for 1920, but that the sum representing the amount of attorney's fees, which had been claimed as a deduction in the return, had been disallowed, and the claim for refund was rejected. (R. 22–24.) A computation of the tax resulting from the foregoing adjustments was set forth, showing an amount due the Government in addition to that already paid for the year, but the letter stated that the assessment of this additional tax was barred by the statute of limitations. (R. 23–24.)

The present suit was brought to recover the refund claimed on account of the Wyoming taxes. The District Court gave judgment for the defendant. (R. 8–9.) The Circuit Court of Appeals for the Tenth Circuit affirmed this judgment. (R. 47.)

ARGUMENT

As the petitioners assert, the question here involved is novel. Their brief makes an able argument to the effect that the decision below is wrong. We do not regard the question as free from doubt, but submit that the following argument in behalf

of the Government, which prevailed in both of the courts below, is sound.

We submit that a refund of income taxes can not be made unless the amount actually paid exceeds the tax properly due on the total taxable income for the year in question.[1]

Under the Revenue Act of 1926, as under prior revenue acts, the allowance of a refund is predicated on an actual overpayment of taxes. Section 284 (a) of that Act (*infra*, p. 13), which was in effect when the claim for refund in the instant case was filed and rejected, provides for the allowance of refunds where there is "an overpayment" of taxes and a balance remains after crediting such excess against any other taxes due but unpaid. The language of the statute discloses no intent to allow a refund unless the taxpayer has paid a larger amount for the year in question than the total tax due for that year. See *Magee* v. *United States*, 37 F. (2d) 763 (C. Cls.), affirmed on other grounds by this Court, 282 U. S. 432; *McCarl* v. *Leland*, 42 F. (2d) 346 (App. D. C.), certiorari denied, 282 U. S. 839.

The court below held that there had been no overpayment of tax in this case since the correct tax

[1] It is true that Sections 607 and 611 of the Revenue Act of 1928 provide that under certain circumstances a tax paid after its collection is barred by the statute of limitations is to be credited or refunded, but it is noteworthy that Section 607 states that payment of such a tax "shall be considered an overpayment." See *Graham & Foster* v. *Goodcell*, 282 U. S. 409.

was in excess of that paid. The petitioners do not urge that the deduction for attorney's fees, which the Commissioner disallowed, constituted an allowable deduction or deny that the computation of the tax resulting from the disallowance of this item and the allowance of the deduction for Wyoming inheritance taxes and other small items is a correct computation. Their contention is merely that the Commissioner had no power to disallow this item, which he had formerly allowed, in determining whether to make a refund for 1920, since the statute of limitations had run as to any additional assessment for that year.

In the absence of a closing agreement the Commissioner may make redeterminations of tax liability, and may assess the taxes found due as the result of such determination provided the statute of limitations has not run. *Burnet* v. *Porter,* No. 203, October Term, 1930, decided by this Court April 13, 1931. Because of that decision, it is unnecessary to consider the earlier cases in the lower Federal courts which petitioners cite.

It is true that the assessment of any deficiency based on a redetermination of tax liability was barred at the time when the last computation in this case was made and the claim for refund was rejected, but the Commissioner has made no attempt to assess or collect the deficiency and is merely seeking to retain taxes already collected and legally due. For that reason we submit that the

petitioners' contentions that the Commissioner has disregarded the statute of limitations and has failed to give the taxpayer the notice of deficiency and the opportunity to appeal to the Board of Tax Appeals required by law are without merit.

The fact that no additional tax could be assessed and collected does not affect the necessity for a correct computation. In ascertaining whether an excessive payment has been made the Commissioner should not be confined to the matters set forth in the claim for refund. *Suhr* v. *United States,* 18 F. (2d) 81 (C. C. A. 3rd). This is a corollary to the rule that the Commissioner can not determine a deficiency without taking into consideration the amount of previous refunds, whether erroneous or otherwise. *Levy* v. *Commissioner,* 48 F. (2d) 725 (C. C. A. 9th); *Onondaga Co.* v. *Commissioner* (C. C. A. 2d), decided June 8, 1931, and as yet unreported.

The case of *Bonwit Teller & Co.* v. *United States,* No. 282, October Term, 1930, decided April 13, 1931, relied upon by petitioners involved the validity of a claim under Section 281 (e) of the Revenue Act of 1924 as amended, and does not seem to us to bear on the question in the instant case.

The other cases cited by petitioner apply to situations different from that here involved, and the decisions in those cases are not inconsistent with the instant case.

CONCLUSION

The instant case is not in conflict with any applicable decisions, and the question presented is not of sufficient importance to justify a review by this Court. The petition should be denied.

Respectfully submitted.

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JULY, 1931.

APPENDIX

Revenue Act of 1918, c. 18, 40 Stat. 1057, 1083, 1085:

SEC. 250. (d) Except in the case of false or fraudulent returns with intent to evade the tax, the amount of tax due under any return shall be determined and assessed by the Commissioner within five years after the return was due or was made, and no suit or proceeding for the collection of any tax shall be begun after the expiration of five years after the date when the return was due or was made. In the case of such false or fraudulent returns, the amount of tax due may be determined at any time after the return is filed, and the tax may be collected at any time after it becomes due.

SEC. 252. That if, upon examination of any return of income made pursuant to this Act, the Act of August 5, 1909, entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," the Act of October 3, 1913, entitled "An Act to reduce tariff duties and to provide revenue for the Government, and for other purposes," the Revenue Act of 1916, as amended, or the Revenue Act of 1917, it appears that an amount of income, war-profits or excess-profits tax has been paid in excess of that properly due, then, notwithstanding the provisions of section 3228 of the Revised Statutes, the amount of the excess shall be credited against any income, war-profits or excess-profits taxes, or installment thereof, then due from the taxpayer

under any other return, and any balance of such excess shall be immediately refunded to the taxpayer: *Provided,* That no such credit or refund shall be allowed or made after five years from the date when the return was due, unless before the expiration of such five years a claim therefor is filed by the taxpayer.

Revenue Act of 1926, c. 27, 44 Stat. 9, 55, 58, 63, 66:

SEC. 274. (a) If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this title, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within 60 days after such notice is mailed (not counting Sunday as the sixtieth day), the taxpayer may file a petition with the Board of Tax Appeals for a redetermination of the deficiency. Except as otherwise provided in subdivision (d) or (f) of this section or in section 279, 282, or 1001, no assessment of a deficiency in respect of the tax imposed by this title and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 60-day period, nor, if a petition has been filed with the Board, until the decision of the Board has become final. * * *
(U. S. C. App., Title 26, Section 1048.)

SEC. 277. (a) Except as provided in section 278—

* * * * *

(3) The amount of income, excess-profits, and war-profits taxes imposed by * * * the Revenue Act of 1918, and by any such Act as amended, shall be assessed within five years after the return was filed, and no pro-

ceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period. (U. S. C. App., Title 26, Section 1057.)

SEC. 283. (a) If after the enactment of this Act the Commissioner determines that any assessment should be made in respect of any income, war-profits, or excess-profits tax imposed by * * * the Revenue Act of 1918, * * * or by any such Act as amended, the Commissioner is authorized to send by registered mail to the person liable for such tax notice of the amount proposed to be assessed, which notice shall, for the purposes of this Act, be considered a notice under subdivision (a) of section 274 of this Act. In the case of any such determination the amount which should be assessed (whether as deficiency or as interest, penalty, or other addition to the tax) shall, except as provided in subdivision (d) of this section, be computed as if this Act had not been enacted, but the amount so computed shall be assessed, collected, and paid in the same manner and subject to the same provisions and limitations (including the provisions in case of delinquency in payment after notice and demand and the provisions prohibiting claims and suits for refund) as in the case of a deficiency in the tax imposed by this title, except as otherwise provided in section 277 of this Act. (U. S. C. App., Title 26, Section 1064.)

SEC. 284. (a) Where there has been an overpayment of any income, war-profits, or excess-profits tax imposed by * * * the Revenue Act of 1918, * * * or any such Act as amended, the amount of such overpayment shall, except as provided in subdivision (d), be credited against any income, war-profits, or excess-profits tax or install-

ment thereof then due from the taxpayer, and any balance of such excess shall be refunded immediately to the taxpayer. (U. S. C. App., Title 26, Section 1065.)

(b) Except as provided in subdivisions (c), (d), (e), and (g) of this section—

(1) No such credit or refund shall be allowed or made after three years from the time the tax was paid in the case of a tax imposed by this Act, nor after four years from the time the tax was paid in the case of a tax imposed by any prior Act, unless before the expiration of such period a claim therefor is filed by the taxpayer; * * *.

Section 3226 of the Revised Statutes as amended by Section 1014 of the Revenue Act of 1924, c. 234, 43 Stat. 253, 343:

SEC. 1014. (a) Section 3226 of the Revised Statutes, as amended, is amended to read as follows:

"SEC. 3226. No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commis-

sioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates. The Commissioner shall within 90 days after any such disallowance notify the taxpayer thereof by mail.

"(b) This section shall not affect any proceeding in court instituted prior to the enactment of this Act." (U. S. C., Title 26, Section 156.)

U. S. GOVERNMENT PRINTING OFFICE: 1931